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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-184

ZACHARY KILLEBREW,
Petitioner,

versus

SECURITY BARGE LINE, INC.,
Respondent.

BRIEF OF SECURITY BARGE LINE, INC. IN OPPOSITION TO PETITION OF ZACHARY KILLEBREW FOR WRIT OF CERTIORARI TO MISSISSIPPI SUPREME COURT

J. A. LAKE and
FRANK S. THACKSTON, JR.
Lake, Tindall, Hunger & Thackston
Weinberg Building
P. O. Box 918
Greenville, Mississippi 38701

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I. STATEMENT OF THE CASE

Petitioner Killebrew, a resident of Holmes County, Mississippi, filed suit in the State Circuit Court of that county against his former employer, SBL, Inc., seeking damages for personal injuries allegedly resulting from SBL's negligence and the the unseaworthiness of M/V ISSAQUENA, a 5000-horsepower Mississippi River towboat.

On Security's motion for change of venue, the suit was transferred to the Circuit Court of Washington County, Mississippi, at Greenville and the case was

tried by a jury there. A division of the U.S. District Court for the Northern District of Mississippi sits at Greenville and petitioner could have filed in that Court, but did not.

As stated in petitioner's brief, the jury in the Circuit Court of Washington County returned a verdict for the petitioner in the amount of $60,000.00. This was so wholly unsupported by any evidence that the trial Judge ordered a remittitur thus reducing the verdict to $35,000.00. The respondent, Security Barge Line, appealed to the Mississippi Supreme Court and that Court found as to the Circuit Court trial that

> "— no negligence of any kind was proved against the ship owner nor was there any evidence of any kind that the vessels were unseaworthy in any way. Therefore, the Appellee (Killebrew) simply did not make out a case and the Court should have directed a verdict for the Appellant."

The Mississippi Supreme Court reversed the lower Court and entered judgment for Security Barge Line, the respondent here.

II. THE ISSUES BELOW

The issues both in the Circuit Court of Washington County and in the Mississippi Supreme Court involve nothing more than "the drawing of allowable inferences from a necessarily unique set of circumstances." These factual issues in the lower Courts were and are

of no interest to anyone except the parties herein. The case involved no conflict between the Court of Appeal and no principles of importance to the public.

III. THE ISSUE HERE

The sole question here is whether under the provisions of 28 U.S.C.A. §1257(3) a writ of certiorari should issue to the Mississippi Supreme Court, in order that this Court might decide whether on nothing more than the unique factual circumstances in this case — the Trial Court or the Mississippi Supreme Court was correct.

There is no "federal question" involved in this case. Even if there were, this Court is not obligated to review it. Indeed, this Court's proper role is quite limited. Mr. Justice Frankfurter stated the situation thus:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances —" a writ should not be granted *Carter v. Atlanta and St. A. B. R. Co. 338 US 430, 438-439, 94 L Ed 236, 243 (Separate opinions).*

In the same opinion, referring to the particular case, Mr. Justice Frankfurter said:

> "There is merely a difference in the application of professedly settled rules to the circumstances of this particular case — For me it is decisive that since the merits involve mere-

ly the evaluation of the unique facts in the record, the case does not fall within the proper business of the Court." (idem.)

In *Wilkerson v. McCarthy 336 US 53, 66-67, 93 L Ed 497, 506* (1949), Mr. Frankfurter again addressed the point:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases canvassed by two and sometimes three Courts *even though those facts may have been erroneously appraised.* The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

Referring to the Court's power to control its docket, he then says:

> "Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; *importance of the outcome merely to the parties is not enough.* It has been our practice to *dismiss* a writ of certiorari even after it was granted *where argument exposed a want of conflict or*

revealed that the case involved no more than its particular facts."

In support of his position, Mr. Frankfurter cited the opinion of Chief Justice Taft speaking for a unanimous Court in *Layne & Bowler Corporation v. Western Well Works, Inc. 236 US 387, 393, 67 L Ed 712, 714* where the Chief Justice said that certiorari should *not be granted* —

> "— except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeal. *THE PRESENT CASE CERTAINLY COMES UNDER NEITHER HEAD."*

The last sentence of the quotation immediately above fits the Killebrew petition perfectly. A very brief look at Killebrew's own testimony confirms this, and for that purpose a short digest of the testimony follows.

R65: Killebrew was first employed by Security on 4-9-69 and quit on 6-30-69: he was rehired on 1-28-71 and quit 2-28-71. He was *NO GREEN HORN.*

R111: Safety Rules (Exhibit 3, p. 202) were posted on bulletin between crew's quarters and galley and Killebrew passed them at least three times a day. RULE 4 forbade jumping.

R202: Killebrew SAW SAFETY RULES but never read them because "nobody ever told me to read them."

R101: Was "stringing" electric light cord from "running lights" on tow when injured. NO HEAVY DUTY — NO COMPLICATED MARINE WORK.

R127: Was one of THREE crewmen engaged in "stringing lights." NORMAL CREW for that job.

R129: Nothing difficult about the job.

THERE IS NO TESTIMONY ANYWHERE OF ANY WITNESS TO KILLEBREW'S "JUMP"!

R206: The ISSAQUENA'S tow of empty barges riding high in the water and loaded barges riding low in the water was usual and common, occurring 90% to 95% of the time. See Security Exhibit 1 (R110).

R93: Killebrew got on empty barge by walking up towknee of M/V ISSAQUENA.

R96-97: Was only 100 feet from towknee when he "jumped," and could very easily have walked 100 feet and gone down same towknee steps which he had previously climbed.

R129: "Nobody told me not to jump," and nobody told him to jump. No one else with him when he elected to jump.

R129: Had to put out running lights on tow everytime dropped or picked up barges — routine job for deckhands such as Killebrew.

R226-7: Barges tied tightly together flush, and no space between.

R109: Killebrew describes his action as a "jump-step."

R132: Killebrew says his "jump" was "3 feet down and 4 feet across." (5 feet along hypotenuse of right triangle).

R265: To use available ladder would be *inconvenient*
R268: — but "it could have been used." (At R227 through R262, Captain Herrington testified that there was one 8-foot ladder in locker room 12 feet from tow-knee up which Killebrew walked, and that there were 4 other ladders hung on sides of M/V ISSAQUENA and available to crew. He testified that the 8-foot ladder weighed no more than 15 pounds).

R116-7: Killebrew admits he continued his regular deckhand duties after alleged injury and never requested that he be put ashore to hospital.

R77: Treated by Dr. Browning about 3 weeks after leaving M/V ISSAQUENA. (See Killebrew, Exhibit 6, R157). Last visit 5 May 1971 (R159) by Dr.

Nix early July 1971 and February 1972. NO OTHER TREATMENT.

R123: Worked steadily for Peaster Tractor Company ("mechanicing" R80) from May, 1971 to 4-3-72 making $350.00 per month (R80).

R135: No complaint about back "after first few months" of Peaster employment.

The Mississippi Supreme Court simply held that Killebrew's evidence did not reveal *any* negligence OR unseaworthiness chargeable to Security. The Court took no issue with any Federal rule.

CONCLUSION

The case involves MERELY THE EVALUATION OF THE UNIQUE FACTS IN THE RECORD.

The facts in the case have been canvassed by two Courts. Even though those facts may have been erroneously appraised, (which respondent certainly does *not* concede) the outcome is of importance merely to the parties. No conflict between Court of Appeal is involved and there is nothing here which is of importance to the public as distinguished from the parties.

The petition for issue of writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

J. A. LAKE
FRANK S. THACKSTON, JR.
P. O. Box 918
Greenville, Mississippi 38701
Attorneys for Respondent

CERTIFICATE

I certify that I have this day mailed postage prepaid by U.S. Mail, three true copies of the foregoing brief in opposition to the petition for writ of certiorari in the above case to Honorable Philip Mansour, P. O. Box 1406, Greenville, Mississippi 38701, attorney of record for petitioner; and that thereby all parties required to be served have been served.

THIS, the ____ day of August, 1973.

J. A. LAKE
P. O. Box 918
Greenville, Mississippi 38701
One of the Attorneys
for Respondent